

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF PENNSYLVANIA

3 RICHARD ROE and : Case No. 2:21-cv-02655-AB  
4 KATHERINE JINES, ET AL, : Case No. 2-21-cv-00346-AB  
5 :  
6 Plaintiffs :  
7 :  
8 v. : Philadelphia, Pennsylvania  
9 :  
10 DEVEREAUX ADVANCED : December 17, 2021  
11 BEHAVIORAL HEALTH, et al :  
12 :  
13 Defendants. : 10:50 a.m.-12:09 p.m.  
14 . . . . .

15 TRANSCRIPT OF ORAL ARGUMENT  
16 BEFORE THE HONORABLE ANITA B. BRODY,  
17 UNITED STATES DISTRICT COURT JUDGE

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1 P R O C E E D I N G S

2 THE COURT: All right. Now, would you like to  
3 introduce, Mr. Kenney, who you're representing?

4 MS. MOLDOVAN: Good morning, Your Honor,  
5 representing plaintiffs.

6 THE COURT: Okay. Annika Martin.

7 MS. MARTIN: Good morning, Your Honor.

8 THE COURT: And Jessica Moldovan.

9 MS. MOLDOVAN: Good morning, Your Honor.

10 THE COURT: And Jeffrey Lutsky.

11 MR. LUTSKY: Good morning, Your Honor.

12 THE COURT: And Cameron Redfern.

13 MS. REDFERN: Good morning, Your Honor.

14 THE COURT: Okay. Some of you are from  
15 Nashville?

16 MS. REDFERN: Our Nashville partner was not able  
17 to make it because of the sudden change, Mark Ellis, but  
18 Jessica and I are from New York.

19 THE COURT: Oh, okay. I'll allow you to stay  
20 anyway.

21 MS. REDFERN: Oh, thank you. I appreciate that,  
22 Your Honor.

23 MR. KENNEY: Your Honor, two associates from my  
24 firm might be attending as well, Mr. --

25 THE COURT: Well, where are they?

1 MR. KENNEY: They should be here by now.

2 THE COURT: Oh, okay. Oh, I should -- do you  
3 want me to wait until --

4 MR. KENNEY: No, it's okay, but just if they  
5 walk in.

6 THE COURT: No, I just wanted -- I just -- and  
7 you're all from New York?

8 MR. KENNEY: I'm from Philadelphia.

9 THE COURT: And you are?

10 MR. KENNEY: Joe Kenney, Your Honor.

11 THE COURT: Okay. And what firm are you from?

12 MR. KENNEY: Sauder Schelkopf.

13 THE COURT: What?

14 MR. KENNEY: Sauder Schelkopf.

15 THE COURT: Okay. All right. It doesn't make  
16 any difference, and you are from where, Mr. Lutsky?

17 MS. LUTSKY: Your Honor, Stradley Ronon.

18 THE COURT: Oh, okay. All right. Okay.

19 I usually reveal that my -- if you're from  
20 Nashville because my family is from Nashville, part of my  
21 family and my brother teaches at the Vanderbilt Law School  
22 and my sister-in-law is the solicitor general of the  
23 state, so --

24 MS. LUTSKY: I'll let our Nashville partner  
25 know.

1 THE COURT: What?

2 MS. LUTSKY: I'll let our national partner know.

3 THE COURT: Okay. I mean, you know, so I just  
4 always reveal it because people know that they're so  
5 active in the legal community there.

6 MS. LUTSKY: Absolutely.

7 THE COURT: And not as practicing lawyers, but  
8 in some kind of official capacity, well I guess a  
9 professor, yeah, it's an official capacity.

10 Okay. All right. The first issue we will -- I  
11 want to address Roe first. I think that that makes sense  
12 to me and let me -- I know that it's your motions to  
13 dismiss. At the same time I like to hear about what  
14 plaintiff has to say about their case. So I'm going to  
15 let you start to argue you call vicarious liability or  
16 they call vicarious liability. Would you like to tell me  
17 what your -- what the facts are in your case that they  
18 address in vicarious liability and then I'll understand  
19 their argument better.

20 Okay. Who's going to argue it?

21 MS. MOLDOVAN: I am.

22 THE COURT: Okay. Ms. Moldovan.

23 MS. MOLDOVAN: Would you like me to --

24 THE COURT: I don't care, whichever is more  
25 comfortable for you. I think -- that's fine. Can -- just

1 as long as I can hear you, if I can't hear you, I'll have  
2 to have you come up.

3 MS. MOLDOVAN: Oh, I can come up, Your Honor.

4 THE COURT: Okay.

5 MS. MOLDOVAN: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MS. MOLDOVAN: So this case is about an  
8 institution that's supposed to care for the most  
9 vulnerable members of our society, who has autism,  
10 intellectual and developmental disabilities and special  
11 need (indiscernible), but Devereaux has repeatedly failed  
12 to do so.

13 As a result of that failure, my clients and the  
14 thousands of children currently in Devereaux custody has  
15 suffered unspeakable harms. They have been raped,  
16 sexually assaulted, physically and emotionally abused.  
17 The (indiscernible) and drugged. Many were explicitly  
18 told to keep quiet and (indiscernible) communicating with  
19 the outside world the plaintiffs (indiscernible) Rosey  
20 (ph) and Deborah Stack (ph) and Devereaux did not  
21 adequately pay, supervise or train.

22 So turning directly to the vicarious liability -  
23 -

24 THE COURT: Well, let them -- I just want to  
25 know the facts from you that you believe are being

1 addressed by the viability motion. I mean, I'm sorry, the  
2 vicarious liability motion. I'm going to let the  
3 defendant tell me about their motion.

4 MS. MOLDOVAN: Sure. In terms of the facts,  
5 Your Honor, that we think are relevant particularly for  
6 vicarious liability --

7 THE COURT: Well, yes, go on.

8 MS. MOLDOVAN: -- so --

9 THE COURT: Well, first I have to find out --  
10 I'll let you come back.

11 MS. MOLDOVAN: Okay.

12 THE COURT: I'm going to make believe this is in  
13 chambers, because I have to -- this helps me understand  
14 the argument better, and that's what I think all of you  
15 care about is that I understand it. So I'm going to ask  
16 you to sit down and then I'm going to hear the vicarious -  
17 - why he believes there's vicarious -- well, you can  
18 start. All right.

19 MS. MOLDOVAN: Sure. So just to give you more  
20 of the facts, Your Honor.

21 THE COURT: Okay.

22 MS. MOLDOVAN: So we're representing ten  
23 plaintiffs in addition to (indiscernible) and then one  
24 plaintiff Roe on top of the class. And for all of these  
25 plaintiffs they were either physically, emotionally or



1 sexually abused and they left Devereaux worse than when  
2 they went there, and continue to suffer from the trauma of  
3 their experiences to this day.

4           So to be clear and particularly relevant to the  
5 vicarious liability analysis, this is not a case about a  
6 few bad apples who committed a few bad acts. This is  
7 about institutional failure and a culture of systemic  
8 abuse and neglect.

9           The actions that Devereaux took came from the  
10 top. They centralized (indiscernible) they centralized  
11 decision-making system, qualities that affect all of the  
12 various facilities and the employees there took their  
13 charge from the top and they -- Devereaux was home,  
14 school, doctor, teacher. Devereaux did everything for  
15 these kids, and Devereaux had a responsibility to care for  
16 these individuals, care for these kids, teach them, clothe  
17 them, refer medicine and give medicine, restrain them,  
18 discipline. All of this is in the confines of what  
19 individuals at Devereaux were supposed to do for the people  
20 in their care.

21           THE COURT: Okay. Thank you very much. All  
22 right. Mr. Lutsky, I know understand what the plaintiffs  
23 are alleging and you can argue against that.

24           MR. LUTSKY: Thank you, Your Honor. Would you  
25 prefer we keep the mask on, is that your preference?

1 THE COURT: Yes.

2 MR. LUTSKY: Okay. That's fine.

3 THE COURT: I really believe that there is a  
4 pandemic.

5 MR. LUTSKY: Okay. Well, regard to the facts  
6 first before I address the legal insufficiency --

7 THE COURT: And just as long as I hear you  
8 that's all that matters and I hear you very clearly.

9 MR. LUTSKY: Okay. With regard to the facts  
10 first before we get to the legal insufficiency of the  
11 vicarious liability --

12 THE COURT: Yes.

13 MR. LUTSKY: -- let me just say, Your Honor said  
14 she wanted to talk about Roe. What I heard was that she  
15 represents individuals that have been raped or abused.  
16 She makes very clear in her Roe complaint, which is what I  
17 understand we're talking about first, that there is no  
18 actual injury being alleged by class. There's only a risk  
19 of heightened injury that she believes has harmed an in  
20 class member. There is no actual injury being alleged by  
21 class members in Roe.

22 Now, in Jines, there are individual plaintiffs  
23 with actual injuries they're alleging. But I just wanted  
24 to make that differentiation for the Court with regard to  
25 her factual presentation on what this is about.

1           With regard to the vicarious liability claims  
2     let me also observe another fact for you, just so we have  
3     this in context. Devereaux is a very large organization.  
4     It services about 25,000 individuals a year. They have  
5     very different needs medically, psychologically, very  
6     different social behavioral needs and operate in 13  
7     states.

8           Because of the very different needs that their  
9     population presents, they have everything from residential  
10    treatment centers to group homes, psychiatric hospitals to  
11    community living groups, to out patient programs. Some  
12    people don't live at Devereaux at all, they just receive  
13    their therapy for social (indiscernible) needs on an out  
14    patient basis. So it's a very large organization.

15           It's been there almost a hundred years. I  
16    wouldn't say served 25,000 individuals a hundred years  
17    ago, but you do the math, there have been millions of  
18    people that have been serviced by Devereaux.

19           So to the extent that there is a presentation  
20    being made about the large member of the (indiscernible),  
21    I just wanted the Court to keep in mind the large  
22    population that services through 6, 7,000 employees across  
23    the country.

24           Now, with regards specifically to the vicarious  
25    liability claims. In both cases, but talking about Roe,

1 the plaintiffs seek to hold Devereaux liable vicariously  
2 for assault and battery. And in almost every case, by an  
3 unknown staff person, they don't allege who the  
4 perpetrator is, they have an unnamed (indiscernible) --  
5 and these are staff people.

6 With regard to the assault and battery claims  
7 specifically it's Count VI in Roe and Count XVI in Jines.  
8 And Pennsylvania and almost all the states they list where  
9 these individuals in Jines reside (indiscernible) when  
10 they were serviced by Devereaux and where their class  
11 members may reside follow the traditional restatement  
12 analysis test for vicarious liability.

13 Which is, in order to be liable --

14 THE COURT: One second. I have that. Do we  
15 have that? I have that back in the chambers. You don't  
16 have a copy of that here, do you? The restatement. All  
17 right. I have one in my book. Just one second. I don't  
18 --

19 THE CLERK: Page 8 at the (indiscernible).

20 THE COURT: Page 8, okay. No, okay, all right.  
21 Okay. Because Pennsylvania -- certainly Pennsylvania  
22 restatement is various -- is very --

23 MR. LUTSKY: Exactly. And the test in  
24 Pennsylvania which is very, very common in these other  
25 states, which are also impacted here is that in order to

1 be vicariously liable, the abuse has to occur within the  
2 course and scope, it's and, and scope of employment.

3 And the issue is scope of employment. And  
4 Pennsylvania courts have consistently held that sexual and  
5 physical abuse of minors are so horrific, so outrageous,  
6 in violation of various criminal statutes and  
7 (indiscernible) certainly in violation of Deveraux's  
8 policies.

9 THE COURT: Well, the plaintiff didn't only  
10 allege sexual issues.

11 MR. LUTSKY: Well, most of their -- I would say  
12 in Jines, there are 11 plaintiffs and some of them raise  
13 sexual issues, some physical and some both. And in the  
14 class action while the representative Roe alleges physical  
15 abuse, the class is on behalf of both --

16 THE COURT: Well, we're not up to the class yet.

17 MR. LUTSKY: Okay.

18 THE COURT: Right now we're only up to Roe, so  
19 let's argue to me on Roe.

20 MR. LUTSKY: So the question about abuse is, was  
21 it done during the scope of the employment of the abuser.  
22 And Pennsylvania courts have consistently held that  
23 particular abuse of minors is not in the course and scope  
24 of employment because it's so outrageous, because it could  
25 not have been done for the benefit of the employer. It

1 was done for the personal gratification of the employee.

2 And Your Honor reached this exact same result in  
3 the (indiscernible) case, which I personally  
4 (indiscernible) case --

5 THE COURT: Well, that was a little different.

6 MR. LUTSKY: Well, it was a sexual abuse case,  
7 but you went through in that opinion very carefully all of  
8 the authorities regarding scope of employment with regard  
9 to abuse of minors.

10 THE COURT: But that was against Penn State,  
11 wasn't it?

12 MR. LUTSKY: Yes, it was.

13 THE COURT: And so he didn't work for Penn.  
14 This was not in the context of Penn State, was it?

15 MR. LUTSKY: He didn't work for Penn State, but  
16 the abuse occurred there and it was alleged --

17 THE COURT: Well --

18 MR. LUTSKY: -- that Penn State facilitated that  
19 because it permitted him to bring minors into the area.

20 THE COURT: Yeah, but this has nothing to do  
21 with this. This is actually people who are -- work for  
22 Deveraux and in the context of Devereaux.

23 MR. LUTSKY: Yes, but there are many, many other  
24 faces in Your Honor's opinion in that Doe case,  
25 (indiscernible) authorities failed to care for. For

1 example, the BM versus Northeast (ph) --

2 THE COURT: You're expecting me to be  
3 consistent, is that what you're saying?

4 MR. LUTSKY: It would be appreciated if it were  
5 to happen. And, in fact, the decision that you reached  
6 there it is a very careful decision, despite the issue  
7 (indiscernible) it goes over the cases very carefully.

8 There are many cases we have cited in our brief,  
9 literally dozens in which courts have said that abuse of  
10 minors is not done for the employer's benefit, so  
11 therefore, it cannot be within the scope of employment.

12 For example, we cite to the BM versus  
13 Northeastern Educational Unit which was a case about  
14 educational institution in the Middle District of  
15 Pennsylvania. In Pennsylvania, we cite the Sanchez v  
16 Lochness (ph) which is a daycare abuse of minors on  
17 premises. There are a number of clergy cases we cited to  
18 as well.

19 THE COURT: That's the -- those are the cases  
20 that come to mind.

21 MR. LUTSKY: Yes, and there's a litany of them.  
22 And Pennsylvania has always adopted scope of employment,  
23 course and scope (indiscernible) agency and has  
24 consistently held the abuse of minors is not done in  
25 furtherance of the employer's business and therefore falls

1 outside as a matter of law, not as a matter of fact, but  
2 as a matter of law, falls outside the course and scope of  
3 employment.

4 Now, the primary response from plaintiff on this  
5 --

6 THE COURT: Well, I'll let them come back and  
7 you don't have to tell me what their -- I'll let you go  
8 back and forth because that's most important to me.

9 MR. LUTSKY: Okay. What I was going to  
10 interject and then, Your Honor, whatever you decide is  
11 fine, they urge two different --

12 THE COURT: I don't want you to argue for them.

13 MR. LUTSKY: Okay.

14 THE COURT: So I want to hear what they have to  
15 say and then you can come back and argue against it, I  
16 have no problem with that.

17 MR. LUTSKY: Okay. All right. Well, like I  
18 said we urge the Court to follow the consistent practice  
19 in Pennsylvania on the state's for course and scope of  
20 employment under matter of law.

21 THE COURT: All right. I'm just going to let  
22 you do -- and then I'm going to ask plaintiff come back  
23 and argue against your contentions as to vicarious  
24 liability, that's -- if you were in chambers, I would just  
25 go back and forth but we're not.



1 MR. LUTSKY: Sure.

2 THE COURT: Okay? All right. Would you like to  
3 argue?

4 MS. MOLDOVAN: Yes, Your Honor.

5 THE COURT: Well, the impact, basically the  
6 impact of the restatement.

7 MS. MOLDOVAN: Sure, Your Honor. We offered  
8 three different theories of liability. We have the  
9 (indiscernible) probation, the traditional scope of  
10 employment (indiscernible) aid of an agency.

11 Regardless of which approaching take, so say  
12 it's the scope of employment, facts matter. That's  
13 exactly what our colleague (indiscernible) but there are  
14 cases that show that sometimes the actions are within the  
15 scope of the employment and cases where there are not.  
16 That's precisely why there are (indiscernible) cases for  
17 example that come out in opposite ways. And you can be  
18 completely consistent with respect to John Doe 6, the Penn  
19 State (indiscernible) case.

20 In that case, there was no connection, as he  
21 says, Your Honor, between Penn State and the abuse that  
22 occurred. So --

23 THE COURT: Why is that material in the context  
24 of vicarious liability? Why is that essential in the case  
25 of vicarious liability, in the context of the restatement?

1 MS. MOLDOVAN: Right, because vicarious  
2 liability is ultimately about when it is appropriate to  
3 hold the employer liable for what the employee does. And  
4 in that case, there has to be a connection between the  
5 (indiscernible) and the harm.

6 In the case of John Doe 6 v Penn State that  
7 connection did not exist. But you have (indiscernible) he  
8 could have taken, unfortunately, could have taken John Doe  
9 6 anywhere to perpetrate the abuse. He happened to take  
10 John Doe 6 to Penn State.

11 The other (indiscernible) when he did that, he  
12 wasn't -- John Doe 6 lived there, that's not true of the  
13 people at Devereaux. The kids at Devereaux live there,  
14 they depend on the people there to prescribe them  
15 medication, to teach them. It's a completely different  
16 case.

17 THE COURT: Well, why is it important that it's  
18 a different case? I mean, in what way -- I mean, I know  
19 what I wrote in Roe -- I mean in Sandusky, but why is it  
20 material to this -- to your analysis of vicarious  
21 liability that this person is not -- that Sandusky was not  
22 working for Penn State, why does it matter?

23 MS. MOLDOVAN: Because it could not be within  
24 the scope of his employment, if he wasn't actually working  
25 there.

1 THE COURT: Okay.

2 MS. MOLDOVAN: And that's not the case for all  
3 the perpetrators in our case. They were working for  
4 Devereaux. They were -- and when they were perpetrating  
5 abuses, they were acting in their capacity as Devereaux  
6 staff. That's a key difference between these two cases.

7 Another difference is the fact that the kids at  
8 Devereaux are captive at Devereaux. They live there, they  
9 sleep there, they get their education there, they get  
10 their medication there. Again, that's not the case with  
11 John Doe 6, that's not the case in the daycare context,  
12 that's not the case in a church context even.

13 This is a particular institutional case and in  
14 that way, it's separate from many of the other vicarious  
15 liability cases.

16 THE COURT: And under the jurisprudence of  
17 vicarious liability why is that material? In other words,  
18 what does -- does vicarious -- the Pennsylvania view of  
19 vicarious liability, why does it matter and what is the  
20 essence of that doctrine in -- relating to this case?

21 MS. MOLDOVAN: The essence of that doctrine is  
22 when is it appropriate to hold the employer liable for the  
23 employees' actions. That's fundamentally what vicarious  
24 liability does that.

25 Now, if -- it definitely takes the place -- the

1 time and place occurs at Devereaux. Defendants do not  
2 dispute that. What they go after is whether it's within  
3 the scope of the employment. And whether or not something  
4 is within the scope of the employment is whether or not  
5 the person is acting in their capacity, in their job, as  
6 they perpetrate the abuse in the context of doing their  
7 job, and that's precisely what happened.

8 For someone at Devereaux to take (indiscernible)  
9 to restrain someone to the point where they get bruises  
10 and they're injured, the restraining is part of the job.  
11 It's just like a case of excessive force. A police person  
12 can use force, but they can't use excessive force. And  
13 once they use excessive force, they're acting within the  
14 scope of their job, they just exceeded their authority and  
15 perpetrated abuse.

16 THE COURT: Okay.

17 MS. MOLDOVAN: The main thing to take away, but  
18 facts matter in this situation and the fact that Devereaux  
19 are such that they were acting within the scope of their  
20 job when they perpetrated the various types of abuse.

21 THE COURT: Okay. All right. Thank you.

22 Let me see, do you have anything to respond, or  
23 should I take everything that was said and simply weigh it  
24 myself. Thank you.

25 Is there anything on vicarious liability that

1     you wish to address that you haven't addressed before?

2                 MR. LUTSKY: The only thing I would say is what  
3     was left out of that discussion, which is an essential  
4     element of vicarious liability is that they  
5     (indiscernible) has to be done to further the employer's  
6     business. It is not done for personal gratification of  
7     the employee, it has to be done to further the employer's  
8     interest. And here --

9                 THE COURT: In other words, if it doesn't  
10    further the employer's interest, it could never be -- it  
11    can never be --

12                MR. LUTSKY: That's correct.

13                THE COURT: Is that your position?

14                MR. LUTSKY: That's correct.

15                THE COURT: Okay. All right. I just want to  
16    know if that's your position. Do you believe that that's  
17    accurate?

18                MS. MOLDOVAN: No, Your Honor, it's not.

19                THE COURT: Okay. I'll weigh that.

20                MS. MOLDOVAN: And if I could just add one final  
21    thing on vicarious liability. In order for us to  
22    understand the full scope of the employee's jobs, we need  
23    discovery. We're at the pleading stage. We understand  
24    that -- as I said, there were teacher, doctor, you know,  
25    parents, but to understand precisely what happened just

1     like in the Barry (ph) case, which is a Pennsylvania case,  
2     we need to know exactly what it was (indiscernible) and we  
3     can get that with discovery.

4             THE COURT: Well, that also would be an argument  
5     on Jines.

6             MS. MOLDOVAN: Yes. Yes, Your Honor.

7             MR. LUTSKY: Your Honor, I'll read from your own  
8     opinion. And I'm not arguing that the facts are exactly  
9     the same, but your analysis of vicarious liability doesn't  
10    differ case-to-case. And we --

11            THE COURT: But I may have gotten smarter in the  
12    last couple of years, I don't --

13            MR. LUTSKY: You're brilliant here, Judge. You  
14    were brilliant (indiscernible) which is restatement  
15    (indiscernible) 228. So we're quoting the restatement.

16            THE COURT: Okay. I can read that, yeah.

17            MR. LUTSKY: And the restatement says, conduct  
18    of a servant is not within the scope of employment if it  
19    is different in kind from that authorized, far beyond the  
20    authorized time and space limits are too little actuated  
21    by a purpose to serve a master.

22            And what these cases consistently hold is,  
23    people that abuse minors are not acting in the furtherance  
24    of the employer's interest. It violates the law. It  
25    violates the employer's policies, it's completely contrary

1 to interest and that's why these cases consistently hold  
2 and we've cited dozens of them.

3 THE COURT: What year was that case, I don't  
4 remember?

5 MR. LUTSKY: It was 2013.

6 THE COURT: Okay.

7 MR. LUTSKY: The law has not changed in  
8 Pennsylvania.

9 THE COURT: All right. Thank you. You know,  
10 there are sometimes I find I was wrong.

11 Okay. The next issue is assault and battery.  
12 Do you want to explain what these -- well, let -- I'm  
13 going to ask you to argue about assault and battery in  
14 Roe.

15 MR. LUTSKY: In Roe, okay.

16 THE COURT: Or Jines, they're both the same.

17 MR. LUTSKY: Well, in both cases the assault and  
18 battery is presented in the complaint. And in both cases  
19 it should be dismissed.

20 We pointed out in our motion to dismiss that a  
21 battery requires an offensive touching. If you haven't  
22 touched a person, you haven't committed a battery. Now,  
23 obviously Devereaux as a foundation, a non-profit  
24 foundation it doesn't touch anybody.

25 Here, they want to hold Devereaux liable for the

1 battery committed by the employees. One argument they  
2 raise is vicarious liability, which we already talked  
3 about, but they also raised an argument in response to our  
4 motion which I don't believe is pled anywhere in the  
5 complaint, but in response to the motion they argue that  
6 there also is direct liability for battery.

7 THE COURT: Let me -- well, I'm going to let  
8 them argue their own case. So I don't want to hear you  
9 telling me what they argue. Let me hear from them and  
10 then I'm going to let you come back.

11 Okay. All right. Why don't you tell me what  
12 you believe that you have a claim for assault and battery  
13 that should survive?

14 MS. MOLDOVAN: So we've alleged that Devereaux  
15 created a culture of prominent abuse where kids were  
16 either abused or waiting in fear for the next time that  
17 they would be abused.

18 Contrary to what the defense has argued, battery  
19 -- all that is necessary for battery is that the actor  
20 intent to cause the other directly or indirectly to come  
21 in contact with a form and substance in that manner which  
22 would reasonably regard as offensive.

23 And that is exactly what Devereaux did by  
24 virtually not putting policies in place to protect the  
25 students and kids in their care.



1           So to commit assault and battery, an institution  
2     does not need to physically touch anyone, nor do they have  
3     to desire to do harm. That's a misunderstanding of the  
4     definition of battery.

5           Sure, that's often what happens when you think  
6     of battery, someone touches someone else, but that's  
7     actually not -- not what is actually required under the  
8     law for a battery.

9           To not appropriate train, pay or supervise its  
10    employees and by knowingly failing to implement policies  
11    Devereaux all but guaranteed that abuse would occur and  
12    that's what intent -- that is tantamount to intent under  
13    the law.

14          For (indiscernible) -- to (indiscernible) a  
15    legal person would know that based on the circumstances  
16    abuse is substantially certain to occur. That is what  
17    Devereaux did by placing the kids in the position that  
18    they did.

19          So, Your Honor, we pled facts that give rise to  
20    battery, to assault and battery. That's what we have to  
21    do in our complaint. So to the extent that defendants say  
22    we haven't pled this theory of liability, all we have to  
23    do is plead the fact that gave rise to this legal claim  
24    and that's what we have done.

25          So again, we understand that an institution did

1 not punch any of the kids. We know, you know, how things  
2 work. We're saying the position that --

3 THE COURT: You're saving derivative -- what  
4 you're saying is derivative assault, if you will; is that  
5 correct?

6 MS. MOLDOVAN: Exactly. And the people who did  
7 the drugging, we're not bringing it against the  
8 perpetrators, we're bringing it against the institution  
9 that engages in that type of behavior, that has its  
10 employees essentially drug kids into a stupor. And there  
11 are cases that support that.

12 So we have the Bardelodi v Gracepoint (ph) case  
13 where a motion to dismiss was denied, where the plaintiffs  
14 sued a hospital for battery on the basis that she was  
15 medicated against her will. That was not against the  
16 individual that gave her the medication. That case was  
17 against the institution where that occurred.

18 Same thing in Freder v Iolaff (ph). Again, this  
19 is where the institution places someone in a position to  
20 come into an event of contract. They don't have to be the  
21 ones that actually (indiscernible).

22 THE COURT: Okay. Thank you. Okay. Mr.  
23 Lutsky.

24 MR. LUTSKY: Thank you, Your Honor. We are in  
25 disagreement on what assault and battery is. Assault and

1 battery requires, and we cited many cases on this in our  
2 brief. Two elements, there has to be an offensive  
3 touching and secondly, there has to be an intent to harm.

4 THE COURT: It's not an assault also, it has to  
5 be a touching?

6 MR. LUTSKY: No, assault and battery. You  
7 cannot battery by omission. That's not a claim. That  
8 doesn't exist, that's what they're arguing, because we  
9 didn't have a policy somebody was battered, therefore we  
10 battered them. That doesn't make any sense.

11 In fact, there is cases cited in our brief, the  
12 Solomon case in Florida, the Forth v McCracken (ph) case  
13 in the Eastern District, you have to have an offensive  
14 touching. You can't have assault and battery by omission.

15 So the basic elements of the claim are not met.  
16 And there's no argument here that Devereaux intended any  
17 harm to the plaintiff in either of the cases. So the  
18 assault and battery cases should be dismissed as a matter  
19 of (indiscernible).

20 THE COURT: Okay. Thank you. All right. The  
21 third, intentional infliction of emotional distress and  
22 that is Title 9; is that correct?

23 MS. MOLDOVAN: We have two claims, the Title 9  
24 claim and the separate intentional --

25 THE COURT: Yeah, well, that's right. Why don't

1     you all give it to me. I mean, why don't you tell me what  
2     the facts are, I'm sorry.

3             MS. MOLDOVAN: Regarding (indiscernible)?

4             THE COURT: I don't care.

5             MS. MOLDOVAN: So, yeah, I'll start with the  
6     Title 9. So, Your Honor, might be more familiar with the  
7     -- there are two type of claims, two type of Title 9  
8     claim. There's pre-assault and post assault claims.

9             The traditional more type of common of Title 9  
10    claim is a post assault claim. That is not the type of  
11    claim that we're bringing. We're bringing what's known as  
12    a pre-assault claim, which requires a showing that an  
13    institution had a policy of deliberate indifference to  
14    past sexual misconduct, that heightened the risk of sexual  
15    misconduct at the institution which resulted in the  
16    assaults that plaintiff (indiscernible) seek.

17            Now, this is precisely the type of claim for a  
18    situation like the one that we have. And in every --  
19    every circuit that considered this type of claim has found  
20    this to be a viable Title 9 theory, and it's completely  
21    consistent with Debnor and Davis (ph), the leading Supreme  
22    Court cases on this issue.

23            Now, for this type of claim the way that you  
24    show it is that the institution was aware of series of  
25    sexual misconducts, and essentially did nothing about it

1 or didn't act appropriately in response to it.

2 And in our complaint, we have alleged more than  
3 just a nebulous culture of abuse, which is what the  
4 defendants say. We have shown at least seven lawsuits  
5 since 1996, one yielding \$50 million in punitive damages,  
6 two exposes and uncovered (indiscernible) kids have been  
7 abused. This is not some, you know, nothing to the paper,  
8 this is the Philadelphia Enquirer that uncovered scores of  
9 abuse.

10 If it weren't enough to become known to the  
11 facts of this case because they true are egregious, so we  
12 have the exposes and there's the lawsuits. And every  
13 other circuit that has addressed this has found with that  
14 type of information, one thing that (indiscernible) the  
15 pleading stage on a pre-assault (indiscernible).

16 So we just want to be clear about two different  
17 things in the context of a pre-assault claim. One is that  
18 in this case, we explicitly alleged educational detriment,  
19 that the students were affected by what had happened.  
20 Moreover, it's clearly severe enough to give rise to  
21 educational detriment.

22 What we have here are not just allegations of  
23 teasing or something like that, we have allegations of  
24 sexual assault and rape. So in addition to the case law  
25 supporting the idea that this is sufficient under the law,

1 social science in the last 10, 15 years have made it  
2 abundantly clear that chronic abuse can give rise to the  
3 inability to learn. We've alleged that in our complaint  
4 as well.

5 And finally, all but one of the plaintiffs  
6 allege that staff members abused them. That's a critical  
7 important difference in something that I believe the  
8 defendants gloss over.

9 When someone in the position of authority abuses  
10 another, the case law confirms that that's different than  
11 care to cure abuse. And Jester (ph) says it explicitly,  
12 no one questions that a student suffers extraordinary harm  
13 when subjected to sexual harassment and abuse by a  
14 teacher. And that the teacher's conduct is reprehensible  
15 and undermines the basic purposes of the educational  
16 system. That's what we have here. That's why a Title 9  
17 claim is appropriate.

18 We have pled allegations that far exceed other  
19 cases where they haven't found a pre-assault claim, and  
20 further this is the tip of the iceberg. This is what know  
21 of publicly, that there are newspapers that are  
22 (indiscernible) this. There is so much more that we don't  
23 know and that's why we need to go into discovery.

24 THE COURT: Okay. Thank you. Mr. Lutsky, would  
25 you like to argue against this?

1 MR. LUTSKY: Yes, Your Honor.

2 THE COURT: All right. Would you like to argue  
3 in favor of your motion?

4 MR. LUTSKY: Thank you. Let me first point out  
5 that there is no Title 9 case claim pled in Roe, it's pled  
6 in Jines, but it's not pled in Roe.

7 THE COURT: Is that right?

8 MR. LUTSKY: Yes.

9 THE COURT: Intentional infliction in Roe?

10 MR. LUTSKY: There's no Title 9 case pled here?

11 THE COURT: Oh, is that right? Yes, because the  
12 other you need it for jurisdiction.

13 MR. LUTSKY: Right.

14 THE COURT: Okay.

15 MR. LUTSKY: So in fact, in Jines for several  
16 reasons plaintiffs gives the only basis for subject matter  
17 jurisdiction of this Court for three of them actually,  
18 Jane Doe 6, John Doe 1 and 2 and Johns, if there's no  
19 Title 9 claim if that's dismissed, there is no subject  
20 matter jurisdiction.

21 THE COURT: Well, there is on certain  
22 plaintiffs.

23 MR. LUTSKY: Yes, but not on those three.

24 THE COURT: Okay. I understand that, but the  
25 issue is whether or not there's a Title 9 claim.

1           MR. LUTSKY: Right. So in Johns, on the Title 9  
2 claim -- first, let me say that they've acknowledged they  
3 can't state the traditional Title 9 claim because they  
4 can't plead or prove that anyone at Devereaux had actual  
5 notice of the propensity for abuse before the --

6           THE COURT: Well, how about -- not only  
7 intentional, how about reckless disregard?

8           MR. LUTSKY: But that's not a Title 9 claim.

9           So with regard to Title 9, what they're arguing  
10 now and this is what counsel just argued, they argued that  
11 while they can't state a traditional Title 9 claim because  
12 they don't have actual notice before the abuse occurred to  
13 those plaintiffs, they find a state where they call pre-  
14 assault claim.

15           And the pre-assault claim they're arguing is  
16 that because of these -- what they claim to be lack of  
17 policies or (indiscernible) of abuse, that they don't need  
18 to show notice to Devereaux.

19           Now, let me say that the Third Circuit has not  
20 adopted this pre-assault theory. This (indiscernible)  
21 case has to --

22           THE COURT: But they haven't found anything -- I  
23 mean, they -- we -- they've been silent on it, we don't  
24 know what --

25           MR. LUTSKY: Yes, it hasn't been tested in the



1 Third Circuit.

2 Now, a minority of courts have permitted this  
3 pre-assault theory but still requires a showing of  
4 deliberate indifference. And here, you don't have facts  
5 showing notice and deliberate indifference.

6 For example, the articles that she cited in the  
7 newspaper, this was published in August of 2020. These  
8 claims in Jines, and that's the only case where there's a  
9 Title 9 claim they go back 10, 20, 30, 40 years or more.  
10 They're not notice of anything, the fact that there was a  
11 case, you know, in 2018 or a case filed in 2020. That's  
12 not notice to Devereaux of an abuse issue that happened to  
13 one of their plaintiffs they allege in 1976, in 2003, in  
14 1994, 1987. Those are after the fact instances, they're  
15 not notice.

16 Secondly, even in the pre-assault theory  
17 jurisdictions, you have to show that the abuse or  
18 discrimination or harassment or whatever you want to call  
19 it, had a severe impact, severe impact, it's a very high  
20 bar when you say this, on their educational activities.

21 Now here, the only thing that's been pled is  
22 that there was an impact on their educational activities,  
23 but there are no facts pled about that at all, just a  
24 conclusory statement.

25 And the cases cited by, and this is really

1 important, the cases cited by the plaintiff on this issue  
2 that show that there's a presumption of a severe impact  
3 when it's teacher on student abuse, they have no  
4 application here at all.

5 None of these cases allege that a teacher abused  
6 anybody, not one. None of them. What they allege is that  
7 a staff member, these are people who are not part of the  
8 educational program. They are people who are in the  
9 health and well being and a clinical and medical program  
10 of Devereaux, they have nothing to do with the educational  
11 program of Devereaux.

12 So all these teacher on student cases they rely  
13 upon are completely irrelevant because the school has the  
14 same teacher (indiscernible) where anybody can enter into  
15 the educational progress.

16 So Devereaux takes care of not only an  
17 educational need for these students, to the extent they  
18 live there, and not everybody does. Many -- and I don't  
19 you don't want to talk about the class yet, but many of  
20 the so-called members of the class don't live there. But  
21 Devereaux also primarily takes care of their medical,  
22 psychological, behavioral needs through a psychiatrist,  
23 clinicians, doctors, nurses, and that's where these staff  
24 members work and that's what their function is, is to work  
25 with them. They're part of the health and well being

1 team, they're not part of the educational team.

2 So there's been no showing in this pleading that  
3 their educational activities were disrupted. Now, I know  
4 that counsel talked about, you know, rape and abuse, but  
5 in Roe, for example, we had a representative who claimed  
6 that he was punished with loss of some food and someone  
7 covered his eyes.

8 In some of the Jenix (ph) cases, some of them,  
9 it's physical only and it's not sexual at all. So here --

10 THE COURT: You're arguing that it can't be  
11 abusive enough so that it's --

12 MR. LUTSKY: You have to plead what the specific  
13 educational impact was, and that wasn't done here. All  
14 they said was anti (indiscernible) traditional activities.  
15 But the courts in this area have basically said that even  
16 severe mental distress, severe emotional distress does not  
17 satisfy it. It has to have a direct impact under  
18 educational activities and there's disruption of those  
19 activities.

20 I'm not saying it couldn't (indiscernible)  
21 happen, there could be cases where it would, but I'm  
22 saying it has not been pled.

23 THE COURT: Okay.

24 MR. LUTSKY: And because it hasn't been pled, it  
25 should be dismissed because it doesn't satisfy the

1 elements of the Title 9 claim, even a pre-assault.

2 THE COURT: Okay. Thank you.

3 MS. MOLDOVAN: Your Honor?

4 THE COURT: Yes, you may respond.

5 MS. MOLDOVAN: A couple of responses, Your  
6 Honor. First with respect to the teacher/student  
7 distinction, the (indiscernible) have not cited a single  
8 case whether the distinction between whether or not  
9 someone is labeled a teacher versus someone labeled a  
10 staff makes any difference in the Title context, but I  
11 have not found one.

12 Whether someone -- the question is whether or  
13 not the person is in the position of authority, and in  
14 that case, Devereaux is covered.

15 The second case I want to mention is in terms of  
16 -- when the Philadelphia Enquirer article came out, and  
17 whether or not that put Devereaux on sufficient notice.  
18 The Philadelphia Enquirer article that came out talks  
19 about lawsuits going back to the '90s and '80s. Devereaux  
20 was on notice of those lawsuits I assume, because at least  
21 one had a \$50 million punitive damage award.

22 So to say that the Philadelphia Enquirer is the  
23 only time that Devereaux could have gotten any sort of  
24 notice is to ignore many of the facts alleged in the  
25 complaint, as far to ignore the reality of what the

1 institution should know about or knows about and  
2 (indiscernible) prove (indiscernible) in discovery. But  
3 the lawsuits go back to the '90s, at least the '90s, and  
4 the Philadelphia Enquirer article mentions another expose  
5 in 1985 about issues with Devereaux staff. So that is far  
6 before 2020.

7 In terms of the severity of the harm, a few  
8 responses. First, we have explicitly alleged that it was  
9 severe. Defendants may not believe that, but that's what  
10 we have alleged.

11 Second, the idea that only -- that mental  
12 anguish is not enough, defendants cite one case where the  
13 Court found that mental anguish was not enough. That is  
14 not in keeping with the majority of case law, which has  
15 found that mental anguish not only is enough, but  
16 obviously is going to result in something as severe as a  
17 rape or a sexual assault.

18 And again Your Honor is correct that Title 9  
19 does not (indiscernible), it's only in the Johns context.  
20 And so there are numerous cases where Courts have found  
21 that the assault itself is what gives rise to the  
22 educational detriment.

23 There's Doe C v The Career Tech Center, which is  
24 from the Middle District of Pennsylvania and that involved  
25 abuse of a student and they did not -- the Court did not

1 look for additional educational (indiscernible) beyond the  
2 abuse. NDB v (indiscernible) Christian School (ph) from  
3 the Western District of Pennsylvania, a 9-year old was  
4 sexually assaulted on a bus. The Court didn't look for  
5 further educational detriment. So --

6 THE COURT: The one thing I haven't -- okay, I  
7 understand your argument there. The -- I did not -- I  
8 don't want to preclude you from arguing intentional  
9 infliction of emotional distress in Roe that is now the  
10 Title 9 claim.

11 MS. MOLDOVAN: Certainly I can address the  
12 IIED.

13 THE COURT: That's right.

14 MS. MOLDOVAN: Yeah, in both cases. All right.  
15 So our argument for IIED is that by not implementing  
16 policies to prevent abuse in the phase of repeated reports  
17 of abuse of children with disabilities Devereaux's  
18 comments were extreme and outrageous.

19 For IIED the type of abuse doesn't matter,  
20 whether or not it was emotional and sexual or physical,  
21 which is why it covers Roe, who alleges physical abuse.

22 So the first thing I'll say about the IIED claim  
23 is we have to -- the law takes into account of the  
24 victims. Here we have kids with disabilities. If there  
25 is ever a case where IIED is appropriate, it's this case.

1 And we're not just talking about the underlying  
2 harassment, it's the institutional betrayal aspect that  
3 gives rise to the IIED.

4 These kids depended on the institution to keep  
5 them safe. So this is completely separate from the  
6 perpetrators who actually abused the kids. This is about  
7 the institution's failure to respond to those kids and to  
8 be deliberately indifferent.

9 So two things about that, the standard for IIED  
10 is not really intentional infliction but also reckless  
11 infliction. That is the standard of Pennsylvania law,  
12 Taylor v Albert Einstein, a 2000 Supreme Court in  
13 Pennsylvania decision that (indiscernible). The standard  
14 was recklessness.

15 There are multiple cases that have found that  
16 where an institution fails to investigate and fails to  
17 follow-up on egregious harms the institution can be held  
18 liable for IIED.

19 So when we talk about (indiscernible) which is  
20 where the institution failed to follow up on reports on  
21 allegations of abuse. But there have been other cases  
22 that have found institutions liable for IIED in  
23 Pennsylvania.

24 So Doe v Moravian College is a 2021 case from  
25 the Eastern District of Pennsylvania. And it held that

1 the college's response to the rape of a student rised to  
2 the level of IIED because leadership at the college  
3 learned that two of its students raped another student and  
4 the college took no action. And in addition to taking no  
5 action, the school discouraged the individual from coming  
6 forward with a complaint. And the Court found that that  
7 would clearly survive a motion to dismiss an IIED claim.

8 The same was found was in NGJ v School District  
9 of Philadelphia, also an Eastern District of Pennsylvania  
10 case from 2017 again denying a motion to dismiss when the  
11 institution failed to follow-up on severe allegations of  
12 abuse.

13 That's precisely what we have in both  
14 (indiscernible) Roe and the Jines case.

15 THE COURT: Okay. Okay. Mr. Lutsky.

16 MR. LUTSKY: Thank you, Your Honor, if I could  
17 just finish up first on the Title 9 in response to --

18 THE COURT: Oh, sure.

19 MR. LUTSKY: -- counsel's argument.

20 THE COURT: Of course.

21 MR. LUTSKY: Title 9 is an educational statute.  
22 So the question is not about whether the severe mental  
23 anguish, we're not arguing that it creates severe mental  
24 anguish we understand that. The question is, does it have  
25 a severe impact on your educational activities. What is



1 the connection to education as opposed to the general well  
2 being?

3 Noe one is arguing that they didn't allege  
4 severe anguish. But there are many cases that we've cited  
5 in our briefs that hold if there's not a direct connection  
6 pled, facts pled to their disruption of their educational  
7 activities it's not a Title 9 thing. It might be  
8 something else, but it's not a Title 9 thing. And that  
9 was our Title 9 argument.

10 Now, with regard to IIED and negligent  
11 infliction. First I want to make clear we didn't seek to  
12 dismiss the negligent infliction claim, so I'm not sure  
13 why you're --

14 THE COURT: So as of record, you're not moving -  
15 -

16 MR. LUTSKY: Not negligent, intentionally yes.

17 THE COURT: Okay.

18 MR. LUTSKY: Not negligent infliction.

19 THE COURT: Is that --

20 MS. MOLDOVAN: Your Honor, I'm only addressing  
21 intentional infliction.

22 THE COURT: Okay.

23 MR. LUTSKY: All right. I thought I heard  
24 arguments about what we should have done and should not  
25 have been --

1 THE COURT: No.

2 MR. LUTSKY: -- so that's why I thought they  
3 were arguing negligent --

4 THE COURT: No.

5 MR. LUTSKY: -- and we're not challenging that.

6 But with intentional infliction it's very clear  
7 from the cases that there has to be conduct of the  
8 institution as distinguished from the abusers. The  
9 institution, which is outrageous, so outrageous that it  
10 would commit a claim for intentional inflict of emotional  
11 distress.

12 And contrary to counsel's argument we have cited  
13 a number of cases which have held that claims like this  
14 while they may state intentional infliction claims against  
15 the abuser, they don't state them against the institution,  
16 because you have to differentiate the conduct.

17 For example, in Doe v Allentown School District,  
18 which is an Eastern District case cited in our case, 2007,  
19 again case involving sexual harassment and assault. The  
20 Court said it is generally only the perpetrator is  
21 considered liable for an intentional infliction claim.

22 The Court went on to say these results are not  
23 surprising because the tort is designed to provide  
24 compensation only for outrageous acts done for the purpose  
25 of causing emotional distress. And in the context of

1 sexual assault, typically the assailant alone intends the  
2 harm and they dismissed the IIED claim against the school  
3 district, the institution for the alleged assault by its  
4 employee. And that's what we have here.

5 We don't have outrageous conduct by the  
6 institution. We have outrageous conduct by the employee.  
7 And the cases hold there's a very, very high bar for  
8 outrageous conduct. For example, there are cases that  
9 even say (indiscernible) is not outrageous. There are  
10 plenty of cases we cited involving sexual harassment and  
11 assault and battery that say the institution did not  
12 commit outrageous conduct.

13 And they want to argue outrageousness by  
14 omission again. Not that we did something, but that we  
15 should have done something. And to me, that properly  
16 falls into the negligent infliction claim which we're not  
17 arguing. They stated it, we'll defend it. But it doesn't  
18 fall into the intentional infliction of emotional distress  
19 by (indiscernible).

20 THE COURT: Okay. Thank you. Do you want to  
21 respond?

22 MS. MOLDOVAN: Yes, Your Honor.

23 THE COURT: Mr. Lutsky, these are ones that I  
24 propose that I get addressed in the -- in this oral  
25 argument, but I will allow you to argue any other that you

1 can think would be helpful, but it's not important for you  
2 to argue, I can go on the papers. I mean, that's what  
3 I've -- these are the things that I wanted to hear about.

4 MR. LUTSKY: Sure.

5 THE COURT: Okay.

6 MS. MOLDOVAN: All right. Two quick responses,  
7 Your Honor. First, we know that it's about the  
8 institution. We didn't even name the perpetrators. So  
9 our point is about holding the institution liable. That  
10 doesn't undercut our claim, that is our claim. It's the  
11 nature of our claim that the institution did not do what  
12 it should have and did not do -- more than that, it was  
13 reckless.

14 So the standard for IIED is one by extreme and  
15 outrageous conduct intentionally or recklessly causes  
16 severe emotional distress to another, is subject to  
17 liability for such emotional distress and bodily harms are  
18 results for such bodily harm.

19 So the standard under Pennsylvania law is  
20 recklessness. What Devereaux did was reckless.

21 THE COURT: Okay. I understand your argument.

22 MS. MOLDOVAN: Thank you, Your Honor.

23 THE COURT: Okay. Is there anything -- I really  
24 don't need argument on the others, on the individual ones.  
25 Do you want -- do you --

1           MR. LUTSKY: No, I would like to be heard on the  
2    class action.

3           THE COURT: Okay. The only -- I usually --  
4    that's such a wide -- I usually like to do that by a  
5    motion to certify or as opposed to -- there's no motion  
6    before me and I'm very reluctant to have you do that. If  
7    you want -- if you insist on it, I will of course hear.

8           MR. LUTSKY: Could I explain why I think it's  
9    important in this case?

10          THE COURT: Okay. Sure.

11          MR. LUTSKY: And --

12          THE COURT: And are you ready -- prepared to --

13          MS. MOLDOVAN: Yes, Your Honor.

14          THE COURT: Okay. All right. You may go  
15    forward.

16          MR. LUTSKY: I'll try to shorten that argument  
17    up (indiscernible) argument, you know, all right, so.

18          THE COURT: Well, that's what I was thinking.

19          MR. LUTSKY: All right. But I will try to  
20    shorten it up.

21          THE COURT: Yeah, and I'll know more about the  
22    case if I allow it to go through to discovery, so.

23          MR. LUTSKY: I acknowledge, Your Honor, that it  
24    is the exception and not the rule.

25          THE COURT: Sure, in a motion to dismiss that's

1 exactly right.

2 MR. LUTSKY: But there are cases in district  
3 courts around the country including in Pennsylvania, both  
4 Eastern and Western which have dismissed and struck class  
5 action allegations even at the pleading stage.

6 THE COURT: Are you really expecting to get that  
7 from me? You've been practicing law here.

8 MR. LUTSKY: Well, let me explain why I think  
9 it's appropriate here and maybe I'm fighting it, but I  
10 don't feel bad about it. I'd like to at least --

11 THE COURT: Yeah, well, of course.

12 MR. LUTSKY: The test is at the pleading stage  
13 is there any amount of discovery that is going to enable  
14 and to certify this class.

15 THE COURT: Okay.

16 MR. LUTSKY: In our view, there is no discovery,  
17 no amount that would enable them to certify this class.  
18 But failure to address it now will exponentially increase  
19 the discovery in this case, because now they're talking  
20 about Devereaux's entire organization, not just what  
21 happened in a particular facility with Roe himself, one  
22 facility. We have 21 of them across the country in 13  
23 states. Now, we're talking about the entire country for  
24 discovery and it will exponentially increase obviously the  
25 cost of litigation for the parties, particularly for my

1 client, I mean, exponentially.

2 So we feel it is consistent with the federal  
3 court philosophy of trying to create efficiency,  
4 resolution of cases to look at this now and consider the  
5 question at least, at least consider the question, is  
6 there any discovery here that could permit this to be  
7 certified under any circumstances.

8 And I'd like to tell you a few things why I  
9 think it won't. Number one, many circuit courts have  
10 noted that Wal-Mart was a gamechanger in terms of  
11 certifying class actions. And Wal-Mart teaches us that  
12 the district court has to perform a quote, rigorous  
13 analysis of the claims and defenses and the elements of  
14 the causes of action that are being offered to support  
15 class action treatment. Well, you can't do that here.

16 And the reason you can't do it here is because  
17 the only count that is mentioned as a class action is  
18 Count XI of the Roe complaint, which is a count and a  
19 cause of action labeled injunctive and equitable relief.  
20 And we have pointed out there is no cause of action, it is  
21 a remedy, not a cause of action.

22 They have acknowledged that and said okay, but  
23 then argued but all our other counts are incorporated by  
24 reference anyway, so the entire complaint is being offered  
25 as a basis for class action treatment.

1           The reason that's an absurd argument is, and  
2   this gets back to what I said earlier, there's no actual  
3   injury being pled in Roe for the class, none. They make  
4   it clear over and over again. The injury is the  
5   heightened risk of harm. That's the injury.

6           Well, you have common law torts here. For  
7   example, assault and battery, intentional infliction of  
8   emotional distress. You cannot state those for heightened  
9   risk of harm. You need an actual battery, not a risk of  
10   battery. There's no such claim that I had risk of  
11   battery.

12           You can have a battery if you were actually  
13   battered, but you can't have a heightened claim of  
14   battery. The same with intentional infliction of  
15   emotional distress, the same with negligence frankly in  
16   Pennsylvania, the same with all the common law torts.

17           And let me say, Your Honor, they have not  
18   identified a single case in all their briefing where a  
19   class was certified based on common law torts. And that's  
20   what we have here. We don't have a statute or a  
21   constitutional mandate that is being argued that  
22   objectively was violated.

23           They don't have a single case that they put  
24   forth, we can't find one, where a class was certified just  
25   based on common law torts.



1 THE COURT: But it's not -- there's no  
2 articulation that that would be precluded, is there?

3 MR. LUTSKY: No. But the reason it's not done  
4 is because you can't make the elements of (indiscernible)  
5 --

6 THE COURT: Okay. Okay.

7 MR. LUTSKY: (indiscernible). So for example,  
8 the most important question for me in addressing -- and  
9 I'll try to keep it shorter, in addressing certification  
10 is, and this is the Wal-Mart's instruction. When you look  
11 at the causes of action that support class action  
12 treatment as they pled, and we think it was only one count  
13 and that's not even a cause of action, but when you look  
14 at it, what you have to ask yourself is, is there a common  
15 question whose answer, and the operative word there is  
16 answer, whose answer will drive the litigation to  
17 resolution. That's the biggest issue in class action  
18 certification. We don't have that here.

19 What they've said is, everybody has a heightened  
20 risk of injury because of either no policy or bad  
21 influence in the policies. That is not a common question  
22 whose answer would drive the litigation. And there are  
23 cases we have cited, Stupenberg (ph) from the Fifth  
24 Circuit, DL v The School District of the District of  
25 Columbia which tried to do the same thing they're doing,

1 except not in torts, but through statute, all of those  
2 cases allege there was systematic failures.

3 THE COURT: Is that in the motion to dismiss  
4 stage?

5 MR. LUTSKY: Yes. No. It was done  
6 (indiscernible).

7 THE COURT: Yeah.

8 MR. LUTSKY: But the principles are the same.  
9 So if you have a case like this one where they're alleging  
10 we have systematic failures, they don't identify a single  
11 injunction that they're requesting. They identify ten  
12 subject areas for injunctions to be created presumably  
13 through experts. That's exactly what the Fifth Circuit in  
14 Stupenberg said is completely contrary to Wal-Mart. You  
15 need a specific course of conduct and specific relief that  
16 either all of the class gets or none of the class gets.  
17 It has to be done in the same stroke.

18 You cannot have ten different subject matters  
19 ranging from hiring to supervision to how we lay buildings  
20 out, to video monitoring, to investigative responses, that  
21 can never be certified as a class because it doesn't  
22 follow along. It doesn't follow with the United States  
23 Supreme Court's decision that you have to have a specific  
24 injunction from an answer to a common question which  
25 resolves litigation and provides relief to all or provides

1 relief to none.

2 This is very much like what happened in the  
3 Fifth Circuit in Stupenberg and the Gill (ph) case. And  
4 both of those cases completely rejected the idea of  
5 certification.

6 Now, they do cite to the Baby Neal (ph) case in  
7 the Third Circuit, that was (indiscernible). In fact, it  
8 was 20 years pre (indiscernible). And it has very little  
9 value today because before Wal-Mart and maybe Your Honor  
10 will remember this, because I know you've been on the  
11 bench a long time, before Wal-Mart it was not that  
12 difficult to certify a class based on a common question.  
13 But the Supreme Court completely changed that.

14 THE COURT: But then the question is whether --  
15 you know what my issue would have to be, whether I follow  
16 the Third Circuit or the Supreme Court. I know that's the  
17 \$64,000 question.

18 MR. LUTSKY: I think all the circuits and all  
19 the district justices have to follow the Supreme Court  
20 (indiscernible).

21 THE COURT: Well, no, but whether I -- that  
22 would have to happen in the context of the Third Circuit,  
23 but not in the context of the --

24 MR. LUTSKY: Well, and I would suggest to Your  
25 Honor respectfully if Baby Neal came up today, after Wal-

1     Mart decision --

2                   THE COURT:   I --

3                   MR. LUTSKY:  -- it would've been decided  
4     completely differently.

5                   THE COURT:  All right.  Okay.

6                   MR. LUTSKY:  So you didn't have any single  
7     question here that can certify a class, none.  And  
8     especially when you wanted (indiscernible) common law  
9     torts involving hundreds of thousands if (indiscernible)  
10    you know at least 25,000 people who'd be in service today  
11    by 7,000 different people, you are not going to find the  
12    commonality that you need to certify a class.

13                   And let me just say one more thing about this,  
14    because I know Your Honor wants me to keep this quite  
15    short.  This is a 23(b)(2) class, which is injunctive  
16    relief only.  No claim here for monetary damages.  And  
17    we've made an argument that Roe is not a typical plaintiff  
18    because he's making a claim for money damages, but I'll  
19    leave that to the (indiscernible).  I'll put that aside.

20                   But in a 23(b)(2) class, there is no opt out  
21    available to the class members.  They have no right to opt  
22    out.  They are bound by the decision.  So if they get an  
23    unfavorable result, it's too bad and they can't come  
24    forward later with their claims.

25                   And because of that, Courts take great care in

1     23(b) (2) cases particularly to make sure the class is  
2     cohesive and the commonality requirements are even that  
3     much more stringent in the 23(b) (2) as opposed to a  
4     monetary 23(b) (3) case.

5             There is no discovery here that will ever take  
6     place that will allow you to consider certifying a class.  
7     The only result will be that we will spend hundreds of  
8     thousands of dollars of wasteful discovery that will lead  
9     to nothing. And that's why I ask the Court to at least  
10    consider the issue at the pleading stage, and cases in  
11    this courthouse and in other federal courts of  
12    Pennsylvania have done that.

13            Judge Winer (ph) did it here when he considered  
14    the fact that in a discrimination case, it was never going  
15    to be certified because they were saying people being  
16    discriminated against for different reasons. It's the  
17    same thing here. Are they getting a heightened risk of  
18    abuse because the building is not properly laid out? Is  
19    it because the video system doesn't work right? Is it  
20    because you don't have a policy on supervision? Is it  
21    because you shouldn't have hired the person in the first  
22    place? This is not a class. This is a super allegation  
23    complaint.

24            THE COURT: I assure you that I will consider  
25    your very interesting argument.

1 MR. LUTSKY: Thank you, Your Honor.

2 THE COURT: Okay. Ms. Martin?

3 MS. MARTIN: Thank you, Your Honor. I agree  
4 with Your Honor this is premature just about --

5 THE COURT: I didn't say I thought it was  
6 premature.

7 MS. MARTIN: I think this is premature. I think  
8 the back and forth that we had in our briefing and that  
9 we're going to have right now just shows that there's a  
10 lot of discussion --

11 THE COURT: Well, his argument is that you will  
12 have absolutely no opportunity to certify a class, that  
13 there will be no -- there's no discovery that you can do  
14 that -- because he talks about extensive discovery. What  
15 are you telling me the discovery might unveil that would  
16 allow you to have a class certification?

17 MS. MARTIN: Certainly, Your Honor. What  
18 policies did they have, what do they look like, how are  
19 they enforced, how are they implemented. Centralized  
20 decision-making, who made the decisions, when they learned  
21 about abuse that happened, what did they do, what were  
22 their discussions, how did they decide whether to change  
23 their policies or not.

24 All these things are infinitely learned in  
25 discovery that will help us to answer the common questions

1     that we would love to brief on class certification, but  
2     did they have a duty to protect those students in their  
3     cases -- the (indiscernible) in their case. Did they  
4     protect duty? And did outreach of the duty cause the  
5     increased risk of abuse and assault to all of the current  
6     class members.

7                 We do have an actual injury here. The injury is  
8     a heightened risk of abuse above the baseline that is in  
9     the public. It's similar to the kind of heightened risk  
10    that you see recognized as an actual current  
11    (indiscernible) injury that you see in (indiscernible)  
12    monitoring classes. Where the defendant's wrongdoing,  
13    those are tort cases as well, the defendant's wrongdoing  
14    has created an increased risk of a disease or some other  
15    kind of sickness, and that increased risk is a liability.  
16    That is an actual harm that everyone is suffering.

17                And you can look at that, take that all the way  
18    back, for example, Friends of All the Children versus  
19    Lockheed where you had the children coming from Vietnam  
20    and the plane lost pressure, and all those children were  
21    then at an increased risk for follow-on illnesses and  
22    injuries related to the severe loss of pressure that  
23    happened when they were being evacuated from Vietnam.

24                Many other medical monitoring cases, that was  
25    from the (indiscernible) court but moving forward to the

1 present day. So that's an example of the kind of  
2 situation where you have an increased risk. Yes, it's a  
3 risk, but this isn't a speculative fear of harm, this is  
4 an actual increased risk that is measurable that affects  
5 everybody that's there now, that that is avoidable. And  
6 that if they do implement reforms and we don't know what  
7 those are yet, (indiscernible) but if they do implement  
8 reforms, that increased risk over the baseline is you  
9 can't eliminate it, and you can't fix that for everyone  
10 across the board, one (indiscernible).

11 It's true that in our briefing we do have a  
12 number of different options that we put in there that  
13 could be things that we might need to be doing, to address  
14 the issues. The problem is we don't know exactly yet what  
15 is wrong with their policies and their enforcement and  
16 their decision-making.

17 All we know, Your Honor, is that something has  
18 gone terribly wrong, because the abuse is rampant, it's  
19 everywhere, it's normalized, it's baked into the culture.  
20 So we need to find out in discovery what are the policies,  
21 (indiscernible) the policies, how are they informed --  
22 enforcing them, what's the (indiscernible) making with the  
23 knowledge that they do have. That's the kind of stuff  
24 that will lead to the answers to the common question that  
25 drive duty and breach and causation for the entire class



1 with regard to the injunctive relief claimed.

2 Certainly the damages is different but damages  
3 is looking back. What happened and how can we compensate  
4 what happened in the past versus what is happening now and  
5 how we prevent in the future.

6 And so that's the reason why the argument that  
7 my colleague made about, at the very end there, about how  
8 -- and its in his briefing as well, if there is a ruling  
9 on injunctive relief that would somehow bind this class so  
10 that they will be unable to bring damages claims in the  
11 future, this has nothing to do with damage claims.

12 An injunctive relief ruling will not have  
13 anything to do with their ability to bring damage claims  
14 for past harm, this is talking about harm that is  
15 affecting them right now as we sit here. All the children  
16 are in Devereaux's care are facing this increased risk  
17 above the baseline right now, and this is about what we  
18 can do to change that so they are not facing that risk.

19 THE COURT: Okay. Thank you. Now, do you want  
20 to respond?

21 MR. LUTSKY: Briefly.

22 THE COURT: Yeah, okay. And I'll give you a  
23 chance to answer. One second.

24 Oh, yeah, okay.

25 MR. LUTSKY: Your Honor --

1           THE COURT: Oh, yeah, I'm going to have one more  
2     issue, thank you.

3           MR. LUTSKY: Thank you. I want to respectfully  
4     suggest that counsel just made my argument for me, that  
5     this will never be a class no matter what happens in  
6     discovery. She said the common question to be answered is  
7     did they have a duty, did they breach it. That's not a  
8     common question for class action certification.

9           Did they have a duty and did they breach it?  
10    How did they breach it? Did they have buildings with  
11    blind spots? Did they not have a video system that was  
12    everywhere, did they not hire the right people, did they  
13    not supervise the right people, did they not retain the  
14    right people, did they not investigate appropriately.

15           She's making my argument. This is not a case  
16    for which discovery will ever be (indiscernible) certified  
17    and common questions whose answer will resolve the class  
18    ever. And she's absolutely just made the argument I've  
19    been arguing for the past ten minutes.

20           This is about 10 or 12 different subject  
21    matters. In fact, I was also (indiscernible) to hear they  
22    even know what policies we have. I mean, that to me  
23    sounds like a fishing expedition and I'm not making any  
24    personal argument on it.

25           But they don't even know what we have, they just

1 know that they have to get in there and look. That's not  
2 a class. A class requires a common question and it  
3 requires a specific injunction, not 10 to 12 subject  
4 matters you want to then prep injunctions for later, which  
5 are not cohesively tied together. This is -- I don't know  
6 how to say it any better than she just said. It's never  
7 going to be a class.

8 THE COURT: Okay. One second. Do you want to -  
9 - no, I want to speak with my law clerk a second.

10 (Pause)

11 THE COURT: Okay. All right. One second.

12 (Pause)

13 THE COURT: All right. The one claim that I do  
14 have -- that I had delineated in my own -- with my own  
15 notes is the claim of the statute of limitations in Jines  
16 and whether or not it's a susceptible to fraudulent  
17 concealment. Do you have -- are you prepared to argue  
18 that? Okay. I'm going to allow the defense to tell me  
19 why you think that -- I understand the facts of that  
20 pretty clearly. Okay.

21 MR. LUTSKY: This is a claim that they -- this  
22 is plaintiff time at statute --

23 THE COURT: Yes.

24 MR. LUTSKY: -- that we're talking about. This  
25 is a claim that arose I think they said between 19 --

1 THE COURT: I have it Kahn and Jane Doe 4.

2 MR. LUTSKY: Jane Doe 4 I believe --

3 MS. MARTIN: Jane Doe was voluntarily dismissed.

4 THE COURT: Oh was it, okay?

5 MR. LUTSKY: We're just talking about Kahn.

6 THE COURT: All right. Okay.

7 MR. LUTSKY: This is allegedly a claim of abuse  
8 about -- over medication not sexual abuse.

9 THE COURT: Uh-huh.

10 MR. LUTSKY: Over medication in 1976 or  
11 thereabouts.

12 THE COURT: Uh-huh.

13 MR. LUTSKY: As I recall the briefing. So we're  
14 talking about more than 45 years ago. An individual who  
15 actually fled the institution and escaped because he  
16 wasn't happy with the way in which they were handling,  
17 including this over medication allegation.

18 This is not a case of tolling the statute of  
19 limitations. There are no acts which they have alleged to  
20 a place within the statutory period. This claim has been  
21 time barred for probably 35 or so years. There's no  
22 recent acts that have been alleged, and there was no  
23 reason for Mr. Kahn not to know what he believed he had  
24 suffered for what he had received in medication from  
25 Devereaux.

1 I don't know if this is a repressed memory case,  
2 it didn't say that, I don't know if it's that, I don't  
3 know if it's a case where he claims, apparently he claims  
4 that once he read about their culture in the newspaper he  
5 now decides that what they did was abuse. Before he  
6 didn't really know that, but when he hears about the  
7 newspaper he decides well, must have been abuse.

8 I mean, this is a textbook claim of statute of  
9 limitations. There's nothing that's happened within the  
10 statutory period to keep it alive.

11 THE COURT: Thank you. What happened in the  
12 statutory period that would keep it alive?

13 MS. MARTIN: As far as Kahn knew what's  
14 happening to him was treatment, it wasn't abuse. If I  
15 could use the (indiscernible) to a stupor, he did not  
16 understand that that was abuse and he did not understand  
17 that for many, many years, and he suffered as a result of  
18 that drug use.

19 Now, a couple of things. The first is that  
20 fraudulent concealment exists where one is told that pain  
21 was part of the normal healing process, that's directly  
22 from the Third Circuit case Bellis v Beloff (ph) and  
23 that's exactly what happened with Kahn. He was told what  
24 was happening to him was part of his treatment.

25 The fact that he ran away because he found it

1 unpleasant, doesn't mean that he was aware that he was  
2 being abused, or that he had a cause of action. With a  
3 child who's going to get chemical therapy, it's likely  
4 that that child would be suffering, would not like what  
5 was happening to her, and might even run away trying to  
6 escape the treatment. That doesn't mean the treatment is  
7 abuse.

8               So -- and in particular, in this, in the Eastern  
9 District of Pennsylvania there was a case where the Court  
10 found that fraudulent concealment applied where the  
11 plaintiff's (indiscernible) disabilities were caused by  
12 the drugs that were prescribed and administered to the  
13 plaintiff by the defendant as part of the therapy which  
14 the plaintiff proved was negligent.

15              So that the entity that prescribed the drugs  
16 that said it's part of treatment, and then used that same  
17 argument to say that the statute of limitations bars the  
18 claim, the institution can't do that, that's fraud. The  
19 institution has lied to the individual and has made it  
20 impossible for the individual to know exactly what  
21 happened to him was abuse.

22              Now, in terms of what's happened in the time  
23 period, my colleague is exactly right, until the expose  
24 came out about Devereaux, my client did not know that what  
25 had happened to him was abuse. He thought it was

1 unpleasant treatment, he knew that there were effects of  
2 it, but he didn't know that it was abuse. And this case  
3 is completely different than other cases like Rice where  
4 the individual understood that what had happened to her  
5 was abuse. That's not this case. They didn't understand  
6 -- Kahn did not understand that he had been abused.

7 And another point that's in our complaint, Your  
8 Honor, is that Kahn now knows that he is sterile. And he  
9 believes the fact that he's sterile and can't have  
10 children is due to the rampant drugs that he was  
11 prescribed at Devereaux and the aftereffects. This is  
12 something that Kahn couldn't have known until recently.

13 THE COURT: Okay.

14 MR. LUTSKY: I'd also like to point out that Mr.  
15 Kahn was a resident in Pennsylvania and also I think in  
16 Texas at times with Devereaux, and obviously the statute  
17 of limitations, Your Honor, is a state law concept. And  
18 the Supreme Court of Pennsylvania addressed this very  
19 issue this year in the Rice case where they denied the  
20 plaintiff's argument that the statute was tolled because  
21 he didn't know about his -- that his abuse was really  
22 abuse until he read a grand jury report.

23 Similar to the argument that they're making here  
24 that he didn't understand it was abuse until he read a  
25 newspaper article about others, not about him, because

1     there was no mention of him in any of the newspaper  
2     articles, but he read it about others.

3             And I think what this (indiscernible) of  
4     Pennsylvania, which his the last word from the  
5     Pennsylvania statute of limitations what they said here in  
6     Rice is important. They said because there was no  
7     pleading, no facts pled that the plaintiff had made  
8     reasonable efforts to inquire into his injuries, that the  
9     judgment on the pleadings was warranted for the defendant.

10            There are no facts pled here that Mr. Kahn did  
11     anything. Now, he may have only recently realized he was  
12     sterile. He may believe it's from the drugs, although  
13     it's not clear that they're alleging it was at all, but he  
14     had lifelong injuries being alleged here. He certainly  
15     knew he was injured, in fact, he knew he was being  
16     mistreated in his mind because he ran away.

17            But he's alleged lifelong injuries and there's  
18     no facts pled, none, that he took any steps to inquire,  
19     make a reasonable inquiry as to whether or not he had been  
20     abused. And the fact that you wake up one day and read a  
21     newspaper article about what happened to other people  
22     that's too late. And that's exactly what happened in Rice  
23     with the (indiscernible) and the Supreme Court of  
24     Pennsylvania said that's insufficient. And they did, as a  
25     matter of law, grant judgment on the pleadings.



1 THE COURT: Okay.

2 MS. MOLDOVAN: If I may --

3 THE COURT: Yes.

4 MS. MOLDOVAN: -- (indiscernible) about Rice?

5 THE COURT: Yes.

6 MS. MOLDOVAN: If you look at Rice it's a  
7 different situation. Rice said that she wasn't aware that  
8 other people were being abused. She specifically said  
9 that she was told by the Diocese that quote, this was an  
10 isolated event. Rice knew that she was being abused.  
11 Rice did not know the extent of the cover-up of the abuse.  
12 That's different from what we're arguing.

13 We're arguing that Kahn did not know that he was  
14 being abused. So this case is not the same thing as Rice.  
15 And the other point I just want to make is that reasonable  
16 diligence is required, but reasonable diligence takes into  
17 account the plaintiff's mental disabilities.

18 So it's not your average person and whether or  
19 not they try to understand. Reasonable diligence has to  
20 take into account who the person is and what that person  
21 has gone through.

22 THE COURT: Okay.

23 MS. MOLDOVAN: Thank you, Your Honor.

24 MR. LUTSKY: Just very briefly. But what Rice  
25 teaches us is you have to allege facts that show their

1 reasonable diligence and there are none here, there's  
2 absolutely nothing in the complaint about that. And  
3 counsel made reference to --

4 THE COURT: Statute of limitations is  
5 affirmative defense.

6 MR. LUTSKY: Yes, but as a matter of law it can  
7 be granted when it's clear on the face of the complaint  
8 that their claim is time barred. It's (indiscernible).

9 THE COURT: Yeah, okay.

10 MR. LUTSKY: And there was none in Rice on the  
11 judgment on the pleadings, not a --

12 THE COURT: Well, judgment on the pleadings is a  
13 little different.

14 MR. LUTSKY: Well, it's a matter of law, it  
15 wasn't a fact based inquiry. It wasn't a summary judgment  
16 motion. It was done on the judgment on the pleadings, the  
17 pleadings themselves. I don't think that's very different  
18 than 4(b)(6) motion.

19 But, you know, counsel has made reference well,  
20 the day to, you know, there were cases in the '90s, cases  
21 in the '80s and there was a Georgia case, apparently none  
22 of this woke up Mr. Kahn. The only thing that woke up Mr.  
23 Kahn was a 2020 newspaper article of the Enquirer. And  
24 again, no facts are pled here to suggest he did anything  
25 to try to determine if he had a claim.

1 THE COURT: Okay. Thank you very much. Okay.  
2 Very interesting argument and I appreciate your coming.  
3 Do you --

4 MS. MARTIN: Just briefly, one housekeeping,  
5 Your Honor.

6 THE COURT: Yes, I have housekeeping too.

7 MS. MARTIN: Okay.

8 THE COURT: No, your housekeeping comes first.

9 MS. MARTIN: Sorry, Your Honor. So I just  
10 wanted to let the Court know this was just to update the  
11 Court, it's not (indiscernible) to Devereaux that  
12 Devereaux released our plaintiff Roe from a Devereaux  
13 facility on August 12th. So he is no longer at the  
14 Devereaux facility. So I just wanted the Court to be  
15 aware of that.

16 THE COURT: But he was at the time of the --

17 MS. MARTIN: Yes, Your Honor, he was there --

18 THE COURT: So you're talking about an  
19 injunction.

20 MR. LUTSKY: Yes, that's the only -- that's the  
21 request for a class cases is injunction and it's black  
22 letter law, you can't (indiscernible) injunction you have  
23 no standing if you're not there, so how does that go  
24 forward?

25 MS. MARTIN: So, Your Honor, first of all

1     Devereaux's waived this argument by failing to include it  
2     in any of their briefing. They've known this, they  
3     released him. So they've lost their shot (indiscernible)  
4     first of all.

5             Second of all, you know, from our standpoint it  
6     doesn't make any difference to the classic situation of,  
7     you know --

8             THE COURT: So is it an injunction perspective?

9             MS. MARTIN: Sure, yeah, but it's  
10    (indiscernible) from the time of filing of the complaint  
11    he was at Devereaux at the time of the filing of the  
12    complaint. This is a class situation of capable  
13    repetition (indiscernible) if Devereaux wants to, they can  
14    release every plaintiff that we have and just keep  
15    releasing them, that's not a (indiscernible).

16            I'm happy to brief this, Your Honor, if they are  
17    trying to make an argument on this right now. I'm just  
18    trying to inform the Court of something that they already  
19    knew.

20            THE COURT: Well, I think it's best, you have to  
21    -- if you object to that, they've now informed you, which  
22    you should have known in the first place, which I'm sure  
23    you probably do.

24            MR. LUTSKY: No, I didn't. The first time I've  
25    ever heard of this was right here.

1           THE COURT: Oh, okay, all right. That this is  
2 not a valid claim now that he's released.

3           MR. LUTSKY: Not for a class. You can't get an  
4 injunction if they're not there.

5           THE COURT: Okay.

6           MR. LUTSKY: I mean, I'll tell Your Honor that  
7 that's exactly the reason why the Jines case, which  
8 included a class when it started, the class was withdrawn  
9 because none of the reps is still there. I mean, this is  
10 black letter law.

11          THE COURT: I don't rule from the bench even on  
12 black letter law.

13          MR. LUTSKY: We're happy to brief it.

14          THE COURT: Okay.

15          MS. MARTIN: Your Honor, (indiscernible) brief  
16 it, I'd like to also be allowed to brief the waiver issue.

17          THE COURT: Okay. Of course, you can brief it.  
18 Any response that he's going to present, you certainly can  
19 brief.

20          MR. LUTSKY: (indiscernible)

21          THE COURT: Well, you'll have a date. You're  
22 now -- it's in your court, of course it's my court, but  
23 it's in your court to -- you now know the information if  
24 you believe that it should be dismissed, you have to --  
25 you would have to be your motion.

1 MR. LUTSKY: In light of the holidays --

2 THE COURT: That's okay. I'm not going to --  
3 when you bring it up?

4 MR. LUTSKY: Yes.

5 THE COURT: If you don't bring it up in a  
6 reasonable period then I will --

7 MR. LUTSKY: Would the middle of January be a  
8 fit?

9 THE COURT: I have no problem with that.

10 MR. LUTSKY: Would that be fit, the middle of  
11 January?

12 MS. MARTIN: Every single (indiscernible) for  
13 response and reply?

14 MR. LUTSKY: Sure. Whatever you need.

15 MS. MARTIN: Sure.

16 THE COURT: Okay. All right. Thank you.

17 All right. I'm -- I'll rule on the motions and  
18 thank you for a very interesting oral argument.

19 MS. MARTIN: Thank you, Your Honor.

20 MR. LUTSKY: Thank you, Your Honor.

21 THE COURT: Hold one second, off the record.

22 (Proceedings concluded at 12:09 p.m.)

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## C E R T I F I C A T I O N

I, Sheila Orms, Court approved transcriber, certify that the foregoing transcript is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



January 5, 2022